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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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MAY 28 1997

Federal Communications Commission
Office of Secretary

In the Matter of)
)
Amendment of Section 73.202(b),) MM Docket No. 96-240
Table of Allotments,) RM File Nos. RM-8946,
FM Broadcast Stations.) 9019
(Lockport and Amherst, NY))

To: John A. Karousos, Chief
Allocations Branch, Policy and Rules Division

MOTION TO STRIKE

On May 12, 1997, Kevin O'Kane (KOK), by his recently-hired counsel, filed a petition for leave to file response and response in the above-referenced rulemaking proceeding. Culver Communications Corp. (Culver), the petitioner for the allocation of Channel 221A at Lockport, NY, opposes the KOK petition and response, which the Commission must dismiss an unauthorized in accordance with § 1.415(d) of the Commission's Rules (47 C.F.R. § 1.415(d)).

As the Commission is aware, Culver filed its petition for rulemaking on November 7, 1996. The Commission released its *Notice of Proposed Rulemaking* on December 6, 1996 (DA 96-1991), ordering the Comment Date of January 27, 1997 with a Reply Comment Date of February 11, 1997. Culver timely submitted its Comments in support of the allocation to Lockport, NY on January 17, 1997. On or about January 27, 1997, KOK filed a counterproposal requesting the channel be allotted to Amherst, NY. KOK's counterproposal consisted of barely two pages of text, two pages of an FM channel study and one page which contained the affidavit of Kevin O'Kane.

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Culver submitted Reply Comments on February 11, 1997, addressing the KOK counterproposal, noting that it intended to more fully address such proposal at such time as the Commission further directs, consistent with the Commission's processing guidelines in the treatment of counterproposals. KOK was served with a copy of the Reply Comments, consistent with Commission Rules. No Reply Comments were apparently filed by KOK on or before February 11, 1997. On March 6, 1997, the Commission issued a public notice which stated that the Commission was treating the KOK filing as a counterproposal in MM Docket No. 96-242. Reply Comments to the KOK counterproposal were due within 15 days of March 6, 1997, i.e., on or before March 21, 1997. On March 21, 1997, Culver timely submitted its Reply Comments to the KOK counterproposal and served KOK with a copy of the filing. KOK apparently did not submit any further filing with the Commission on or before March 21, 1997.

Incredibly, nearly two months later, on May 12, 1997, well after the close of the rulemaking proceeding, KOK apparently hires himself an attorney to assist him in the rulemaking ("[u]ndersigned counsel was recently contacted to advise Mr. O'Kane regarding his proposal and to assist in the prosecution thereof." KOK petition at p. 1). KOK's newly-hired counsel then goes on to state that certain issues have been raised for the first time in the reply comments submitted by Culver apparently as justification for the submission of the late filing. Not only does this statement fail to satisfy any standard of "good cause"

by KOK for the receipt into the record by the Commission of the late filing, as can be seen from the submission of Culver's Reply Comments (both the February 11th and March 21st submissions), such a statement is simply not true. Culver directly addressed matters stemming from the counterproposal filed by KOK, limited as it was.¹ If KOK wanted the materials it now seeks to be included in the record, it was required to provide such information in its initial counterproposal, for which Culver would be given full opportunity to respond by the reply comment dates set by the Commission. The Commission has consistently held that counterproposals must be technically and procedurally correct at the time of their filing. *Three Lakes, Newbold, Nakoosa and Port Edwards, Wisconsin*, 8 FCC Rcd. 3889, Note 3 (1993); *Flora and Kings, Mississippi and Newellton, Louisiana*, 7 FCC Rcd. 5477, Note 4 (1992); *Atchison, Horton and Wathena, Kansas*, 7 FCC Rcd. 4645, Note 3 (1992). Having failed to adhere

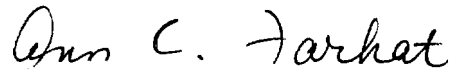
¹ Culver is loathe to address the contents of the petition but it is important to note that KOK mischaracterizes Culver's arguments in its Reply Comments wherein KOK states: "[s]pecifically, Culver argues that Amherst should be denied a first local service preference because it is located within the Buffalo Urbanized Area." KOK petition, p. 1. This is not accurate. In its limited counterproposal, KOK argued that it was more deserving of the allocation since it "would be the first full-time transmission service for Amherst." KOK counterproposal, p. 1. In its reply comments, Culver properly noted that under the Commission's allocation priority policies, if KOK's statement was intended to claim credit that an allocation to Amherst would be "first local service" under priority 3 (and therefore entitled to a preference), it should be ignored since both Lockport and Amherst have stations licensed to them, and consequently, priority 4 (other public interest matters) must be used to make the determination. Culver Reply Comments filed March 21, 1997, p. 2.

to Commission rules and policies, KOK's petition and response must be stricken from the record.

Unauthorized pleadings such as the one filed by KOK well after the close of the rulemaking record cause considerable delay and result in needless additional time required to be expended by the Commission's staff. This is even more clear here where ample opportunity existed for which KOK could have submitted a complete proposal at the time of his submission of his counterproposal. Moreover, Mr. O'Kane is not a neophyte. He has acted *pro se* in Commission matters in the past, including the successful reinstatement of a construction permit for a new low power television station (see Appendix A attached).

Accordingly, for the foregoing reasons, Culver Communications Corporation respectfully requests that the Commission strike from the record the unauthorized petition for leave to file response and response, and proceed to the issuance of a *Report and Order* based on the rulemaking record herein as it existed at the close of business on March 21, 1997.

Respectfully submitted,



Ann C. Farhat

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Suite 250
Washington, D.C. 20036
202/833-4190

Counsel for Culver
Communications Corporation

May 28, 1997

Appendix A

BROADCAST ACTIONS

Kept 74156
5/19/97

Action of 5/12/97

MS BPTVL	-960515KS	W07BN CHAN-7	BRUCE INDEPENDENT TV, INC. BRUCE, MS	APPLICATION GRANTED TO VHF TV TRANSLATOR LOW POWER BROADCAST CONSTRUCTION PERMIT TO CHANGE ERP: .327 KW, AND RCMSL: 219.5 METERS.
MT BLTTV	-970409JB	K09WS CHAN-9	ROUNDUP T. V. TAX DISTRICT ROUNDUP, MT	APPLICATION GRANTED LICENSE OR LICENSE MODIFICATION FOR VHF TRANSLATOR STATION LICENSE TO COVER (BPTTV-970409JA, AS REINSTATED) FOR A NEW STATION.
MT BPTTV	-970409JA	K09WS CHAN-9	ROUNDUP T. V. TAX DISTRICT ROUNDUP, MT	APPLICATION GRANTED TO VHF TRANSLATOR STATION CONSTRUCTION PERMIT TO REPLACE EXPIRED PERMIT. (BPTTV-JD0415GT, FOR A NEW STATION)
NM BLTT	-970409JD	K20CV CHAN-20	REGENTS UNM OF NM BD ED ALBUQUERQUE RATON, MAXWELL, COLFAX, NM	APPLICATION GRANTED LICENSE OR LICENSE MODIFICATION FOR UHF TRANSLATOR STATION LICENSE TO COVER (BPTT-960515JF) FOR CHANGES.
NM BPTTL	-910503YB	K63CD CHAN-63	VISION BROADCASTING NETWORK, INC ALAMOGORDO, NM	APPLICATION GRANTED TO UHF TV TRANSLATOR LOW POWER BROADCAST CONSTRUCTION PERMIT TO ADD LA LUZ, HOLLOMAN AND BOLES ACRES TO PRINCIPAL COMMUNITY, CHANGE TO PLUS OFFSET, ERP 15.144 KW ANT. SCALA 3DR-450U (COMPOSITE), HEIGHT 31 METERS, RCMSL 2393 METERS, ORIENTATION 340, 270 AND 205 DEGREES TRUE.
NY BLTTL	-970313JD	W60BY CHAN-60	CRAIG L. FOX SYRACUSE/NEDROW, NY	APPLICATION GRANTED LICENSE OR LICENSE MODIFICATION FOR UHF TV TRANSLATOR LOW POWER BROADCAST LICENSE TO COVER (BPTTL-JA0702RS, AS MODIFIED) FOR A NEW STATION.
NY BLTTL	-970324JC	W29BJ CHAN-29	KEVIN O'KANE BURLINGTON, NY	APPLICATION GRANTED LICENSE OR LICENSE MODIFICATION FOR UHF TV TRANSLATOR LOW POWER BROADCAST LICENSE TO COVER (BPTTL-970325JR, AS REINSTATED) FOR A NEW STATION.
NY BPTTL	-970325JR	W29BJ CHAN-29	KEVIN O'KANE BURLINGTON, NY	APPLICATION GRANTED TO UHF TV TRANSLATOR LOW POWER BROADCAST CONSTRUCTION PERMIT TO REPLACE EXPIRED PERMIT. (BPTTL-950319JB, AS REINSTATED, FOR A NEW STATION)
TX BLTVL	-970310JK	K12OX CHAN-12	INTERNATIONAL BROADCASTING NETWORK CROCKETT, TX	APPLICATION GRANTED LICENSE OR LICENSE MODIFICATION FOR VHF TV TRANSLATOR LOW POWER BROADCAST

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Revised by OMB
3060-0407
Expires 03/31/97

FOR
FCC
USE
ONLY

BHPTTL-970325JR

FCC 307

APPLICATION FOR EXTENSION OF BROADCAST
CONSTRUCTION PERMIT OR TO REPLACE EXPIRED
CONSTRUCTION PERMIT

(CAREFULLY READ INSTRUCTIONS BEFORE FILLING OUT THIS FORM)

FOR COMMISSION USE ONLY

FILE NO.

1. APPLICANT NAME (Last, First, Middle Initial)

O'Kane, Kevin

MAILING ADDRESS (Line 1) (Maximum 35 characters)

4811 Jenkins Rd.

MAILING ADDRESS (Line 2) (Maximum 35 characters)

CITY

Vernon

STATE OR COUNTRY (if foreign address)

New York

ZIP CODE

13476

TELEPHONE NUMBER (include area code)

315-829-4847

CALL LETTERS OR OTHER FCC IDENTIFIER (IF APPLICABLE)

W29BJ

2. A. Is a fee submitted with this application?

☐ Yes ☒ No

B. If No, indicate reason for fee exemption (see 47 C.F.R. Section 1.1112).

☐

Governmental Entity

☐

Noncommercial educational
licensee/permittee

☒

Other (Please explain):

LPTV station

C. If Yes, provide the following information:

Enter in Column (A) the correct Fee Type Code for the service you are applying for. Fee Type Codes may be found in the "Mass Media Services Fee Filing Guide." Column (B) lists the Fee Multiple applicable for this application. Enter in Column (C) the result obtained from multiplying the value of the Fee Type Code in Column (A) by the number listed in Column (B).

(A)

FEE TYPE CODE

- - -

(B)

FEE MULTIPLE
(if required)

0 0 0 1

(C)

FEE DUE FOR FEE TYPE
CODE IN COLUMN (A)

\$ ----

FOR FCC USE ONLY

3. PURPOSE OF APPLICATION:

☐

a. Additional time to construct
broadcast station

☒

b. Construction permit to replace
expired permit

4. IDENTIFICATION OF OUTSTANDING CONSTRUCTION PERMIT

Legal name of Applicant

Kevin O'Kane

File Number

BPTTL-960319JB

Call Letters

W29BJ

☒

Main Transmitter

☐

Auxiliary Transmitter

Frequency

560 - 566 MHz

Channel No.

29

City

Burlington

State

NY

5. Submit as an Exhibit a list of the file numbers of pending applications concerning the station, e.g., major or minor modifications, assignments, etc.

Exhibit No.
N/A

6. EXTENT OF CONSTRUCTION

a. Has equipment been delivered?

☒ Yes ☐ No

If No, submit as an Exhibit a description of what equipment has been ordered, from whom and when it was ordered, and the promised delivery date (if any). If no order has been placed, so indicate and explain.

Exhibit No.
N/A

b. Has installation commenced?

☒ Yes ☐ No

If Yes, submit as an Exhibit a description of the extent of installation, the date on which installation commenced, and the estimated date by which construction can be completed.

Exhibit No.
1

7.(a) If application is for extension of construction permit, submit as an Exhibit any additional construction progress not specified above and reason(s) why construction has not been completed.

Exhibit No.
N/A

(b) If application is to replace an expired construction permit, submit as an Exhibit the reason for not submitting a timely extension application, together with any additional construction progress not specified above and the reason(s) why construction was not completed during the period specified in the construction permit or subsequent extension(s).

Exhibit No.
2

c. Are the representations, including environmental, contained in the application for construction permit still true and correct?

☐ Yes ☒ No

If No, give particulars in an Exhibit.

Exhibit No.
3

9. Since the filing of the applicant's last application, has an adverse finding been made or final action been taken by any court or administrative body with respect to the applicant or parties to the applicant in a civil or criminal proceeding, brought under the provisions of any law relating to the following: any felony; mass media-related antitrust or unfair competition; fraudulent statements to another governmental unit; or discrimination?

☐ Yes ☒ No

If the answer is Yes, submit as an Exhibit a full disclosure concerning the persons and matters involved, including an identification of the court or administrative body and the proceeding (by dates and file numbers), and the disposition of the litigation. Where the requisite information has been earlier disclosed in connection with another application or as required by 47 U.S.C. Section 1.65(c), the applicant need only provide: (i) an identification of that previous submission by reference to the file number in the case of an application, the call letters of the station regarding which the application or Section 1.65 information was filed, and the date of the filing; and (ii) the disposition of the previously reported matter.

Exhibit No.
N/A

The APPLICANT hereby waives any claim to the use of any particular frequency or of the electromagnetic spectrum as against the regulatory power of United States because of the previous use of the same, whether by license or otherwise, and requests an authorization in accordance with this application. (See Section 304 of the Communications Act of 1934, as amended.)

The APPLICANT acknowledges that all the statements made in this application and attached exhibits are considered material representations and that all the exhibits are a material part hereof and are incorporated herein as set out in full in the application.

WILLFUL FALSE STATEMENTS MADE ON THIS FORM ARE PUNISHABLE BY FINE AND/OR IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001), AND/OR REVOCATION OF ANY STATION LICENSE OR CONSTRUCTION PERMIT (U.S. CODE, TITLE 47, SECTION 312(a)(1)), AND/OR FORFEITURE (U.S. CODE, TITLE 47, SECTION 503)

CERTIFICATION

1. By checking Yes, the applicant certifies, that, in the case of an individual applicant, he or she is not subject to a denial of federal benefits that includes FCC benefits pursuant to Section 5301 of the Anti-Drug Abuse Act of 1988, 21 U.S.C. Section 862, or, in the case of a non-individual applicant (e.g., corporation, partnership or other unincorporated association), no party to the application is subject to a denial of federal benefits that includes FCC benefits pursuant to that section. For the definition of a "party" for these purposes, see 47 C.F.R. Section 1.2002(h).

☒ Yes ☐ No

2. I certify that the statements in this application are true, complete, and correct to the best of my knowledge and belief, and are made in good faith.

Name Kevin O'Kane	Signature <i>Kevin O'Kane</i>
Title	Date 3/21/97

Exhibit 1
Kevin O'Kane
March, 1997

Construction of W29BJ began on September 10, 1996 and was completed on
October 18, 1996.

Exhibit 2
Kevin O'Kane
March, 1997

The permittee apologizes for his oversight in not filing a timely application which should have been the filing of a license application rather than for an extension. W29BJ was constructed during the time period of September through October, 1996. The permittee was hurriedly preparing to commence broadcasting in time for the fall ratings period of November, 1996, as the station was to provide FOX network programming to a number of cable systems in Otsego County. Due to the time pressure in making final arrangements to deliver the programming on time, the permittee neglected to file the license application for the station. This was discovered only recently when looking through the files for the station and therefore a license application has been expeditiously prepared and is being filed concurrently with this application for replacement of the expired CP.

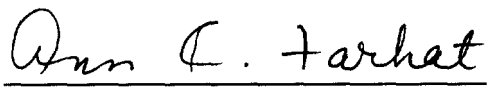
Exhibit 3
Kevin O'Kane
March, 1997

The representations contained in the application are still true except that the permittee is using an adjacent tower to the one specified in the application for construction permit. The change which involves a horizontal distance of 475 feet from the authorized location is permitted under Section 74.751(b)(4)(i) of the Commission's Rules. The concurrently filed license application has more detail regarding the change and its compliance with the Rules.

CERTIFICATE OF SERVICE

Ann C. Farhat, a member of the firm of Bechtel & Cole Chartered, has caused a copy of the foregoing Motion To Strike to be mailed on the 28th day of May, 1997, by U.S. first class mail, postage prepaid, for service on:

James L. Oyster, Esquire
Law Offices of James L. Oyster
108 Oyster Lane
Castleton, VA 22716
Counsel for Kevin O'Kane


Ann C. Farhat